

In the Supreme Court of the United
States.

OCTOBER TERM, 1914. No. 288.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Sonman Shaft Coal Company.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The serious misstatements as to the purport and effect of the evidence embodied in the Brief of the defendant in error necessitate this Reply Brief.

We have in our brief dealt with the legal propositions advanced by the defendant in error in support of the judgment of the Court below, and further discussion of these propositions is not rendered necessary by anything contained in the defendant in error's Brief.

The following statements are made in defendant in error's Brief:—

“The car equipment of the Railroad Company was a burden on its hands; it was lying on storage sidings,

and coal generally was sluggish in the market."
(Page. 2.)

Contrast this statement with the following statement, also in defendant in error's Brief:—

"Witness after witness testified that the times were normal as to demand for coal." (Page 6.)

And with the testimony of Mr. Vance C. McCormick, the treasurer of the defendant in error, who had charge of the selling of its coal, to the following effect:—

"By MR. LIVERIGHT:

"Q. State what the market demands for coal were in the period from April 1st, 1903, to April 1st, 1907; that is to say, whether there was anything extraordinary in the market during that period?

"A. I don't remember anything extraordinary. Simply, to my mind, normal years. The country was in fairly good shape. I mean ordinary business condition, fairly good business condition." (Transcript of Record, page 38.)

These further statements are made in the Brief.

"There was no occasion for any rule (i. e., for allotment and distribution of cars), for it was alleged by the coal company, and conceded as well as proven by the railroad company, that the latter had on hand and available for distribution—if it wished to distribute them—an abundance of cars at all times during the period of the action." (Page 12.)

"Defendant below went to much trouble to prove that throughout the period of the action there was an excess of cars on its own lines, a surplus of cars stored and not in use." (Page 40.)

"Defendant below answered that it had cars, plenty of cars, cars in such quantities that it had to store them—instead of giving them to the coal company." (Page 40.)

None of these statements are supported by the evidence and some of them are in direct conflict therewith. The statement that it was alleged by the coal company that the railroad company "had on hand and available for distribution—if it wished to distribute them—an abundance of cars at all times during the period of the action" is directly at variance with the allegation of the plaintiff's Statement of Claim to the following effect:—

"That the defendant company did not as required by law provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms and corporations mining and producing bituminous coal."

The statement that throughout the period of the action there was an excess of cars and that cars were a burden and lying on storage sidings of the Railroad Company, has absolutely nothing to justify it. The defendant in error offered no proof whatever to this effect. Indeed such proof would have been totally at variance with the allegation of the Statement of Claim that the car equipment of the plaintiff in error was inadequate for the needs of the shippers. The plaintiff in error, in order to establish that at times the cars which it had were sufficient even for the requisitions made by shippers (which, as a rule, were largely in excess of their actual needs) undertook to establish that there were times when it had cars in excess of these requisitions. This testimony is set out in part at pages 33 and 34 of the Brief of the defendant in error. By referring to this it will be seen that one witness testified that on a given day—April 28th, 1904—the distribution sheets of the defendant showed that there were empty coal cars on the sidings of the Railroad Company. By refraining from giving the whole testimony of this witness the defendant in error would give the impression that these amounted to 900. The 900 cars which were on sidings on that day included other than coal cars, and there was no testimony as to how many of the 900 were coal cars. The other witness who testified on the subject said that

there were times during the period of the action when there had been coal cars on the sidings.

There will be found at pages 84 and 85 of the Transcript of Record, a statement showing the distribution of cars made in the period of the action, and by referring to this it will be seen that there was only one period when there was a surplus of cars on hand, and it was not necessary to make allotment, this period being from January 1st to 13th, 1906.

Why this allotment was necessary we have pointed out in our main Brief, and in view of the finding of the jury that the plaintiff in error had an adequate supply of cars during the period of the action, it is perhaps unnecessary to advert to the considerations which make it clear that the shippers would not have benefited had the plaintiff in error had a supply of cars which would have been sufficient to enable it to furnish every shipper with cars equal to the capacity of his mine. But it may not be amiss to quote from a letter of the General Superintendent of Transportation of the plaintiff in error, which very succinctly states why the ownership of such additional cars would not have benefited shippers.

"We fully realize that from the mining standpoint a regular and uniform car supply is desirable and conducive to economical operation; but we also fully realize that if we could command sufficient cars to regularly supply all of our 525 mines with cars equal to our adopted ratings or 7211 per day, it would not be more than a week or ten days before cars would be so tied up under load that we would have to place embargoes and that the resultant empty car supply would be just what it is to-day, namely, approximately the number of cars unloaded."

At page 30 of the defendant in error's Brief what is stated to be a colloquy between counsel for the railroad company and Mr. McCormick, a witness of the coal company, is quoted in support of the preceding statement in the

Brief that "to throttle competition and to control the supply of a necessary of life, the carrier undertook in a period of free car flow to say how much coal should be marketed and who should do the marketing. To keep up prices for its friends and favorites it made coal cars artificially short."

The attempt to make use of the inquiry of counsel for the plaintiff in error as to the effect upon the price of coal of shipments up to the capacity of the mines on the plaintiff in error's road as indicative of a desire or purpose on the part of the railroad company to maintain the price at a higher figure than would have ruled had the available cars permitted shipments up to the capacities of the mines, is so disingenuous that it is hard to treat it as a case of over-zeal on the part of counsel.

The inquiry in question was induced by this consideration. The defendant in error in estimating its damages, had assumed that the price of its coal would not have been affected had it shipped an amount equal to the productive capacity of its mines. Of course if it was entitled to cars equal to the productive capacity of its mine, all other shippers were so entitled, and as the volume of shipments would have been more than doubled if all shippers had had cars available for shipments up to their mines' capacities, it was inevitable that in an effort to find a market for the coal the price would be largely reduced, and of course if this would have been the result of a car supply equal to the mines' capacities, then the plaintiff's damages, assuming that it was entitled to a full car supply, ought to have been measured with reference to the price which coal would probably have commanded under such conditions. The Transcript of Record confirms absolutely the accuracy of this statement.

At page 3 of the defendant in error's Brief this statement is made:—

"Finally, plaintiff below saw the writing on the wall and rather than run its organization at a constant loss, it sold part of its coal to the Berwind and Keystone

and others in a position to command a car supply from the railroad company. These competitors thereupon assumed the place of the latter as a common carrier, saw that the plaintiff below got cars in such measure as their own needs might justify and require, and the coal company's shipments increased in volume."

This statement is inexcusably misleading.

There is absolutely no testimony to the effect that deliveries of cars were made by the Railroad Company at the instance of either the Berwind or Keystone Companies for the purpose of enabling the defendant in error to load and ship coal which it had contracted to sell to these companies.

The plaintiff did sell coal to the Berwind, the Keystone and other companies which were owners of private cars, and the railroad company by direction of these owners delivered some of their individual cars at the mines of the defendant in error to be loaded with coal which had been thus purchased.

The cars which were thus delivered to the defendant in error were not distributable cars, and none of them could have been placed at its mines except by direction of their owners. The fact, therefore, that these cars were not delivered except by direction of the companies owning them, and only for the purpose of being loaded with the coal which they had purchased, affords no justification whatever for any criticism of the plaintiff in error. The extract which we have quoted from the defendant in error's Brief, however, was not, we apprehend, intended as a criticism of the real transaction, but was designed to give an erroneous impression of the facts connected with the delivery of these cars.

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